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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE
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10 ELIM CHURCH OF GOD, a Washington non-
11 profit corporation; and ROMEO FULGA,

12 Plaintiffs,

13 v.

14 HILDA SOLIS, Secretary of the United States
15 Department of Labor, et al.,

16 Defendants.

CASE NO. C10-1001RSM

ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

17 This matter is before the Court for consideration of the parties cross-motions for summary
18 judgment. Dkt. ## 17, 22. Plaintiffs Elim Church of God (“Elim”) and Romeo Fulga filed this action
19 for a declaratory judgment and injunctive and mandamus relief, seeking favorable Court action
20 regarding an immigrant visa petition filed by Elim on behalf of Romeo Fulga. By filing cross-motions
21 for summary judgment, the parties are in agreement that there are no material facts in dispute, and the
22 matter may be determined as a matter of law. The Court deems oral argument unnecessary. For the
23 reasons set forth below, plaintiffs’ motion for summary judgment shall be denied, and defendants’
24 motion shall be granted.

25 FACTUAL BACKGROUND

26 Plaintiff Romeo Fulga is a native and citizen Romania. He came to the United States in 1991 on
27 an F-1 student visa to obtain a bachelor’s degree in Biblical Studies at Pensacola Christian College in
28 Pensacola, Florida. Declaration of Romeo Fulga, Dkt. # 18, ¶ 2. After two years his financial support

1 was depleted, and he began a series of transfers to other colleges where he could continue his religious
2 studies. *Id.*, ¶ 3. He married in 1995, and in 1997 Mr. Fulga and his wife moved to Bellevue,
3 Washington. *Id.* ¶¶ 4, 5.

4 Plaintiff began attending Elim Church of God in 2000, and hoped he would eventually be able to
5 work there as a pastor. *Id.*, ¶ 6. To that end, Elim submitted an Application for Alien Employment
6 Certification to the United States Department of Labor on April 3, 2002. Declaration of Ovidiu Piscuc,
7 Dkt. # 19, ¶ 10. The application was approved and Elim received the labor certification dated July 1,
8 2002. *Id.*, ¶ 11. Elim then prepared an Immigrant Petition for Alien Worker (“I-140 petition”) naming
9 Mr. Fulga as the beneficiary. *Id.*, ¶ 14 and Exhibit D. Over the next several years, the attorney
10 representing Elim and Mr. Fulga in the application process requested that they provide additional
11 documentation of the church’s ability to pay Mr. Fulga. *Id.*, ¶ 15; Declaration of Romeo Fulga, Dkt. #
12 18, ¶¶ 16-21. In the summer of 2005, plaintiffs learned that the I-140 petition had not yet been
13 submitted, *Id.*, ¶ 21. Attorney Bart Klein recommended that Mr. Fulga find another church to sponsor
14 him, and that he should submit an I-360 petition for religious workers instead of the I-140. He also
15 recommended that Elim begin paying Mr. Fulga a salary, which it did for the years 2006 and 2007. *Id.*,
16 ¶¶ 22, 23.

17 Frustrated with a lack of response from their attorney, plaintiffs contacted a new attorney in
18 Georgia in January 2008. *Id.* ¶¶ 25-27. They paid him a fee of \$7500 in June 2008, but shortly
19 thereafter this attorney stopped answering phone calls. *Id.*, ¶ 27. Plaintiffs then retained a third attorney
20 in December 2008. This new attorney, who now represents plaintiffs in this action, advised them that
21 the labor certification had expired January 12, 2008, based on an intervening change in the applicable
22 rules, and could no longer serve as the basis for an I-140 petition. *Id.*, ¶ 28.

23 Plaintiffs filed this action seeking declaratory and injunctive relief, and a finding that the
24 retroactive application of a rule change was arbitrary, capricious, an abuse of discretion, or otherwise
25 contrary to law. Plaintiffs also ask that the Department of Labor be estopped from enforcing the revised
26 regulation against them.

27 The parties have agreed in their cross-motions that this case may be resolved on summary
28 judgment. Plaintiff has framed the question of law, which involves “the retroactive application of a rule

1 by the Department of Labor which deprived the Plaintiffs of the right to achieve immigration benefits
2 granted to them in 2002.” Plaintiff’s Motion for Summary Judgment, Dkt. # 17, p. 1. Defendants
3 contend in their motion that the rule in question was properly promulgated and that it has no
4 impermissible retroactive effect, so they are entitled to judgment as a matter of law. Defendants’ Cross-
5 Motion for Summary Judgment, Dkt. # 22, p. 1. The Court has jurisdiction pursuant to the Declaratory
6 Judgment Act, 28 U.S.C. § 2201, and the Administrative Procedure Act, 5 U.S.C. § 706 (“APA”).

7 ANALYSIS

8 The Immigration and Naturalization Act (“INA”), codified under Title 8 of the United States
9 Code, and its accompanying regulations, sets out a three-step process for obtaining an employment-
10 based immigrant visa. The process consists of (1) issuance of a labor certification from the Department
11 of Labor (“DOL”), (2) classification of the foreign worker by United States Citizenship and Immigration
12 Services (“USCIS”) in the appropriate preference category, and (3) issuance of a visa (if the alien is
13 outside of the United States) or the approval of an adjustment of status (if alien has already been
14 admitted to the United States.)

15 The first stage of this process involves the certification by DOL that the issuance of an
16 employment-based visa and admission of the alien worker to the United States will not have an adverse
17 affect to the American labor force. The relevant statute provides that in order for an alien to obtain an
18 employment-based immigrant visa for entry into the United States, the DOL must first certify to the
19 Secretary of State and the Attorney General that:

20 (I) There are not sufficient United States workers who are able, willing, qualified . . .
21 and available at the time of application for a visa and admission to the United States
22 and at the place where the alien is to perform such skilled or unskilled labor; and

23 (II) the employment of such alien will not adversely affect the wages and working conditions
24 of workers in the United States similarly employed.

25 8 U.S.C. § 1182(a)(5)(A)(i) (I-II). The Secretary of Labor has promulgated regulations governing the
26 administration of the labor certification process, found generally at 20 C.F.R. § 656. Prior to March 28,
27 2005, an employer applied for labor certification by filing an Application for Alien Employment
28 Certification (Form ETA-750). 20 C.F.R. § 656.21 (2001).

1 Plaintiffs' 2002 labor certification was obtained under the predecessor regulation. The
2 regulation at that time provided that "[e]xcept as provided in paragraph (d) of this section, a labor
3 certification is valid indefinitely." 20 C.F.R. § 656.30(a) (2001). However, in 2007, the DOL modified
4 its regulations regarding the time period a labor certification remained valid. The 2007 regulation states
5 in relevant part:

6 (1) An approved permanent labor certification granted on or after July 16, 2007 expires if
7 not filed in support of a Form I-140 petition with the Department of Homeland Security
8 within 180 calendar days of the date the Department of Labor granted the certification.

9 (2) An approved permanent labor certification granted before July 16, 2007 expires if not
10 filed in support of a Form I-140 petition with the Department of Homeland Security within
11 180 calendar days of July 16, 2007.

12 20 C.F.R. § 656.30(b) (2007). Pursuant to this regulation, plaintiffs' 2002 labor certification expired
13 180 days after July 16, 2007, on January 12, 2008. As plaintiffs' attorney advised them in December,
14 2008, the USCIS will reject a visa petition filed with an expired labor certification.

15
16 Plaintiffs contend that they had a vested right in a labor certification that was valid
17 "indefinitely," and that its expiration by operation of the 2007 rule, without notice to them, amounts to
18 an impermissible retroactive application. They contend that DOL lacks the authority to issue rules that
19 operate retroactively absent statutory authority to do so. Plaintiffs' Complaint, Dkt. # 1, ¶¶ 5.3, 5.7.
20 Such retroactive enforcement of the amended regulation, they argue, constitutes an abuse of discretion
21 under the APA. *Id.*, ¶ 5.6.

22 In considering plaintiffs' contentions, the Court applies the two-step analysis set forth in
23 *Landgraf v. USI Film Products*, 511 U.S. 224 (1994), to determine whether the regulation at issue is
24 impermissibly retroactive. As originally formulated for addressing statutes, the first step requires a
25 determination as to whether Congress has clearly expressed that the law is to be applied retroactively.
26 *Landgraf*, 511 U.S. at 280. If the statute or regulation does not contain an express command that it be
27 applied retroactively, the Court must go to the second step, which requires a determination as to whether
28 the statute or regulation would have a retroactive effect. *Id.* When, as here, an administrative rule is at

1 issue, this inquiry is framed slightly differently: whether Congress has expressly conferred power on the
2 agency to promulgate rules with retroactive effect, and if so, whether the agency clearly intended that
3 the rule would have retroactive effect. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208
4 (1988).

5 The parties have cited no statutory provision that would indicate Congress has conferred on DOL
6 the power to make retroactive rules regarding labor certifications. Therefore, the analysis proceeds to
7 the second step, which is consideration of whether 8 C.F.R. § 656.30(b) has an impermissible retroactive
8 effect.

9 A law is not unlawfully retroactive merely because it upsets expectations based in prior law.
10 *Landgraf*, 511 U.S. at 269. Instead, retroactivity generally involves the imposition of “a new disability
11 consequent to a completed act.” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 45 (2006). “A
12 [regulation] has retroactive effect when it ‘takes away or impairs vested rights acquired under existing
13 laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to
14 transactions or considerations already past.’ ” *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (citations
15 omitted). “[T]he judgment whether a particular [regulation] acts retroactively ‘should be informed and
16 guided by “familiar considerations of fair notice, reasonable reliance, and settled expectations.” ’ ” *Id.*;
17 *see also Mejia v. Gonzalea*, 499 F. 3d 991, 997 (9th Cir. 2007).

18 It is plaintiffs’ contention that they had a settled expectation in the continued validity of the 2002
19 labor certification, because as issued it was valid indefinitely. Plaintiffs base this argument on several
20 dictionary definitions of the word “indefinitely,” indicating that it means “for a period of time with no
21 fixed end.” Plaintiff’s Response, Dkt. # 23, pp. 4-6. Plaintiffs contend that a reasonable person would
22 conclude from this that the labor certification approved by the DOL was “not subject to any time related
23 deadline.” *Id.*, p. 23. Plaintiffs would thus have the Court equate the term “indefinitely” with
24 “endlessly.” However, that is a strained interpretation of the term “indefinitely.” The fact that a
25 certification is “valid indefinitely” does not mean it is valid “forever;” a reasonable person would
26 understand that an indefinite period is uncertain and subject to limitation at some point. This is
27 particularly so where the underlying statute, which established the requirement for a labor certification,
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1 clearly requires a determination that there are not sufficient qualified workers **available at the time of**
2 **application for a visa.** 8 U.S.C. § 1182(a)(5)(A)(i)(I) (emphasis added). It was not reasonable for
3 plaintiffs to expect that a determination made in 2002, based on conditions existing in the labor market
4 at that time, would still support an I-140 visa application submitted more than six years later. As one
5 court recently noted, the promulgation of § 636.30(b) simply brought the labor certification
6 requirements into compliance with the “textual mandate” of 8 U.S.C. § 1182(a)(5)(A)(i)(I), thus
7 furthering a Congressional purpose of protecting United States workers. *Durable Manufacturing Co., v.*
8 *United States Department of Labor*, 578 F. 3d 497, 502 (7th Cir. 2009).

9 Plaintiffs also contend that it was an abuse of discretion for DOL to apply the 2007 regulation to
10 them, as they had no notice of the potential expiration of the 2002 certification. This argument is
11 without merit. Plaintiffs received legally sufficient notice of the change by publication of the proposed
12 rule change and notice of the final rule in the Federal Register. 71 Fed.Reg. 7656, 7663 (DOL) Feb. 13,
13 2006; 72 Fed.Reg. 27904, 27946 (DOL) (May 17, 2007). The final rule went into effect sixty days after
14 publication, effectively giving plaintiffs an additional two months, beyond the 180 days provided in the
15 rule, to file their labor certification in support of an I-140 visa petition. It appears that it was former
16 counsel’s lack of diligence, rather than a lack of notice, which led plaintiffs’ failure to timely submit
17 their visa application.

18 Applying the “familiar considerations of fair notice, reasonable reliance, and settled
19 expectations,” the Court finds that the 2007 regulation did not have an impermissibly retroactive effect.
20 Plaintiffs had legally sufficient notice of the 2007 regulation and its potential effect on the validity of
21 their 2002 labor certification. In light of that notice, they had no reasonable basis for reliance on the
22 continued validity of that certification beyond January of 2008. Further, the regulation did not impose
23 “a new disability consequent to a completed act.” *Fernandez-Vargas v. Gonzales*, 548 U.S. at 45.
24 Securing the labor certificate was not a completed act but merely the first step in a three-step process for
25 obtaining an I-140 visa. Their failure to timely complete the process is attributable to factors wholly
26 outside the 2007 regulation.

27 Plaintiffs contend that this case is controlled, to their benefit, by Ninth Circuit precedent on
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1 retroactivity of labor certification regulations, citing *Maceren v. INS*, 509 F. 2d 924 (9th Cir. 1974). In
2 *Maceren*, a native and citizen of the Philippines was denied a visa because the labor certification
3 supporting the petition he filed had expired while the petition was pending, due to the retroactive
4 application of a modification to a DOL rule, 29 C.F.R. § 60.5(b). The modification, dated February 4,
5 1971, invalidated a labor certification one year after the date it was actually made, and required re-
6 validation after that date. A separate regulation in the INA rules was revised March 30, 1971 to insert
7 provisions regarding an alien's right to proceed with a visa application "so long as the supporting labor
8 certification is valid and unexpired. . ." 8 C.F.R. § 204.4(b) (1971). *See, Maceren*, 509 F. 2d at 937-38.
9 The appellate court found that the INS interpretation of the interaction of the two revised provisions led
10 to an incongruous situation, and rejected the interpretation as producing an "unjust, unreasonable, or
11 absurd result." *Id.* at 941. Finding that the retroactivity provisions of § 60.5(b) and § 204.4(b), were
12 "irreconcilable," the court determined that the earlier regulation must give way to the later in time, and
13 held that 29 C.F.R. § 60.5(b) could not be applied retroactively to invalidate Maceren's labor certificate.
14 *Id.*

15 The decision in *Maceren* is clearly inapplicable to this case, where there is neither an
16 irreconcilable conflict between two regulations, nor an absurd result. In *Maceren*, the labor certification
17 expired by operation of newly-promulgated 29 C.F.R. § 60.5(b) while the visa application was pending.
18 Here, plaintiffs had not yet submitted Mr. Fulga's I-140 visa application at the time the labor
19 certification expired in 2008. Beginning with the first publication of notice of the proposed rule in the
20 Federal Register, plaintiffs were advised that they may have a limited time to complete steps two and
21 three of the I-140 visa application process, if they wished to use the 2002 labor certification. With the
22 publication of the final notice on May 17, 2007, they were advised that they had eight months to act on
23 the labor certification they had already obtained, or would have to seek a new one. Because they had
24 notice of the change and ample time to act, the Court cannot find the unjust result that obtained in
25 *Maceren*.

26 While there does not appear to be any Ninth Circuit authority directly on point, the Court notes
27 that the Seventh Circuit *Durable Manufacturing* case, cited above, addresses the situation here. The
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1 court found that the promulgation of § 656.30(b) was within the statutory authority of DOL, and not
2 impermissibly retroactive. *Durable Manufacturing v. United States Department of labor*, 578 F. 3d at
3 502. While this Court has conducted its own analysis of the issues, it finds the *Durable Manufacturing*
4 case consistent with its conclusions.

5 Finally, although plaintiffs' complaint invokes the jurisdiction of this Court under the APA, 5
6 U.S.C. § 706, and asserts that the agency action should be set aside as an abuse of discretion, they have
7 not advanced in their motion for summary judgment any arguments under that section, separate from the
8 retroactivity argument addressed herein. Nor have they advanced any argument or legal authority for
9 their estoppel claim. The Court therefore need not reach these issues.

10 CONCLUSION

11 The Court finds that 29 C.F.R. § 656.30(b) is not impermissibly retroactive as applied to
12 plaintiffs. Accordingly, plaintiffs' motion for summary judgment (Dkt. # 17) is DENIED. Defendants'
13 cross-motion for summary judgment (Dkt. # 22) is GRANTED, and this action is DISMISSED. The
14 Clerk shall enter judgment in favor of defendants and close this case.
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17 Dated this 21 day of November 2011.

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21 RICARDO S. MARTINEZ
22 UNITED STATES DISTRICT JUDGE
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